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MICHAEL ROD

in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

No. 72-1548

M. MURRAY SCHECHTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT	3
REASON FOR GRANTING THE WRIT	5
ARGUMENT	5
CONCLUSION	7
APPENDIX A	App. 1
APPENDIX B	App. 7
APPENDIX C	App. 9

CITATIONS

Case	Page
Boyd v. United States, 116 U.S. 616 (1886)	5

CONSTITUTION AND STATUTES

United States Constitution, Fifth Amendment	2
18 U.S.C. 7201	3
28 U.S.C. 1254(1)	2

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M. MURRAY SCHECHTER respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra, pp. App. 1) is not yet reported. The opinion of the District Court is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on March 23, 1973. (App. A, infra, pp. App. 1). A petition for rehearing was denied on April 20, 1973 (App. B, infra, pp. App. 7). The mandate was stayed pending the filing of this petition on or before May 20, 1973 (App. C, infra, pp. App. 9). The jurisdiction of this Court is invoked pursuant to Title 28 United States Code §1254(1).

QUESTION PRESENTED

I.

DID THE TRIAL COURT'S MISINTERPRETATION OF THE PETITIONER'S RIGHTS UNDER AMENDMENT V OF THE UNITED STATES CONSTITUTION HAVE A SUBSTANTIAL AFFECT UPON THE VERDICT OF GUILTY?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Five:

"No person—shall be compelled in any criminal case to be a witness against himself——."

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code §7201:

ATTEMPT TO EVADE OR DEFEAT TAX

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

The petitioner, a physician, for the year 1967 reported gross receipts of $203,496.00 and taxable income of $165,100.00. For 1968 gross receipts of $213,633.00 and taxable income of $167,132.00. He omitted taxable income for the year 1967 in the amount of $21,958.15 and for 1968 in the amount of $43,910.74. An additional tax liability of $14,054.00 for 1967 and $31,953.00 for 1968 resulted from these omissions of income.

The petitioner's secretary maintained a daily record book in which all receipts were correctly reflected. The petitioner personally transferred the daily receipt numbers to monthly summary sheets and thereafter totalled the gross receipts from the monthly summary sheets.

In the year 1967, the omitted income resulted from 20 transposition errors when copying from the daily record book to the monthly summary sheets and 11 adding machine errors.

In the year 1968, the omitted income was the result of 25 transposition errors and 10 adding machine errors.

The day book, which contained all of the correct information, together with the inaccurate summary sheets and adding machine tapes, were furnished to the accountant in connection with the preparation of the income tax returns.[1]

The doctor did not furnish the Internal Revenue Service Agent his 1966 records. When the Court learned that the request for the 1966 records was made in 1969, the Court stated referring to the Agent, "You had a right to look at his 1966 records."

The case was tried to the Court under an indictment alleging violations of Title 26 United States Code §7201. The petitioner was adjudicated guilty and sentenced to four years imprisonment under the split sentence provisions of Title 18 United States Code §3651 wherein the defendant is to be confined to an institution for six months and the balance of the sentence suspended and placed on probation for a period of three years. In addition, he was fined $10,000.00 on each count.

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[1]The accountant, however, testified that the petitioner read off the numbers and the accountant did not even spot check the accuracy of the totals although the records were in his possession. This failure was his decision and not the petitioner's.

REASON FOR GRANTING THE WRIT

The Trial Court's misinterpretation of the petitioner's constitutional rights was in conflict with applicable decisions of this Court.

ARGUMENT

The petitioner conceded the deficiencies alleged in the indictment. The only issue was that of wilfulness.

Of primary importance was the petitioner's claim of lack of consciousness of the transposition and adding machine errors. Consistent with this unawareness, the evidence disclosed that the petitioner, upon request, *voluntarily* produced for examination by the Internal Revenue Service the daily record book, the inaccurate summary sheets and the erroneous adding machine tapes. The Agent by simply adding the daily record book and comparing it with the monthly summary sheets and adding machine tapes discovered the errors and the deficiencies alleged in the indictment.[2]

It is the petitioner's position that had he known of the errors, he could have declined to furnish these personal records. *Boyd v. United States*, 116 U.S. 616 (1886)

The Trial Court, in misinterpreting the petitioner's Fifth Amendment rights as to his records for the year 1966, clearly was under the same misunderstanding of the law regarding the petitioner's same rights concerning his records for the years 1967 and 1968.

[2]It should be noted that the *only evidence* of the deficiencies and the errors came from these records.

The Trial Court incorrectly determined that the government had the right to examine the petitioner's personal records. Accordingly, the Court could not have considered the legal interrelationship between the petitioner's voluntarily submitting his personal records for examination and the defense of lack of wilfulness.[3]

Under all of the circumstances of this case, the question of guilt was a very close factual issue. The Court's erroneous interpretation of the law affected the substantial rights of the petitioner.

[3]The term wilfulness encompasses intent and knowledge of wrongdoing.

CONCLUSION

In view of the foregoing, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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